VONAGE
THE BROADBAND PHONE COMPANY

THE COMMISSION SHOULD IMMEDIATELY FIND THAT VONAGE'S SERVICES ARE INTERSTATE AND SUBJECT TO EXCLUSIVE FEDERAL JURISDICTION

Ex Parte Presentation WC Docket No. 03-211

I. INTRODUCTION

On September 22, 2003, Vonage Holdings Corporation ("Vonage") filed a Petition seeking a declaratory ruling that the Minnesota Public Utilities Commission ("PUC") regulation of Vonage's DigitalVoice™ service was unlawful under federal law. Among several possible grounds for relief requested in the Petition, Vonage sought a ruling that its service should be deemed interstate in nature and therefore subject to this Commission's exclusive jurisdiction. Petition at 27-28. Limiting relief on this narrow ground would allow the Commission to grant the Petition without having to reach the question of whether Vonage's service should be classified as an information service or a telecommunications service.[1] Moreover, this narrow approach would be in keeping with the Commission's decisions in the *AT&T Access Charge* and *pulver.com* proceedings, in which the Commission ruled without prejudice to the results in the generic *IP Enabled Services* proceeding.

In light of the Minnesota PUC's appeal to the U.S. Court of Appeals for the Eighth Circuit of the District Court's *Vonage* Order, timely Commission action on Vonage's Petition is crucial. Indeed, the Commission recognized as much in its *Amicus Brief* filed in the Eighth Circuit proceeding, in which the Commission asked the Court to hold the PUC's appeal in abeyance pending decisions in this and the *IP Enabled Services* dockets.[2] Specifically, the Commission cited the importance of avoiding a conflict such as that between the Commission's *Cable Modem Declaratory Ruling* and the Ninth Circuit's decision in *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003).[3] The Commission cannot, however, assume that its

[1] Vonage, of course, believes that DigitalVoice is properly classified as an information service, as the Distict Court determined in *Vonage v. Minnesota PUC*, 290 F. Supp. 2d 993 (D.Minn. 2003) ("District Court *Vonage* Order"), and as Vonage explained in its Petition and Reply Comments.

[2] *See* Brief of the United States and the Federal Communications Commission as *Amici Curiae*, *Vonage Holdings Corp. v. Minnesota PUC*, Appeal No. 04-1434 (U.S. Court of Appeals for the Eighth Circuit April 21, 2004).

[3] *Amicus Br.* at 27 n.5.

request to hold the case in abeyance will be granted. Vonage therefore urges the Commission to grant its Petition on the narrow jurisdictional grounds discussed herein and in the Petition.

II. THE COMMISSION SHOULD GRANT VONAGE'S PETITION WITHOUT FURTHER DELAY

A. The Commission Need Not Reach the Statutory Classification Issue

As the Commission has recognized, "section 2(a) of the [Communications] Act … give[s] the Commission exclusive jurisdiction over interstate communications."[4] Section 2(a) explicitly precludes state regulation of interstate communications services. Thus "questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and … the states are precluded from acting in this area."[5] Consistent with the statutory scheme, courts have affirmed Commission decisions displacing state regulation of interstate communications on the grounds that "interstate communications … are placed explicitly within the sphere of federal jurisdiction by the plain language of the Communication Act."[6] The Commission therefore has the authority to preclude state regulation that impermissibly intrudes on the Commission's exclusive domain over interstate communications.[7]

The Commission's authority to assert exclusive federal jurisdiction over regulation of Vonage's interstate service does not depend on whether the Commission classifies Vonage's service as an "information service" regulated under the Commission's Title I ancillary jurisdiction or a "telecommunications service," subject to regulation under Title II of the Act Rather, the Communications Act is clear that the Commission's authority to assert exclusive

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[4] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27 (rel. Feb. 19, 2004) ("*FWD Order*") at n.57 (*citing* 47 U.S.C. § 152(a)).

[5] *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir. 1968).

[6] *National Ass'n of Regulatory Util. Comm'rs v. Commission*, 746 F. 2d 1492, 1501 n.6 (D.C. Cir. 1984).

[7] As explained by the Supreme Court, federal law and policy is exclsusive and can preempt state action: (1) when Congress expresses a clear intent to preempt state law; (2) when there is outright or actual conflict between federal and state law; (3) where compliance with both federal and state law is in effect physically impossible; (4) where there is implicit in federal law a barrier to state regulation; (5) where Congress has legislated comprehensively, thus occupying an entire field of regulation; or (6) where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *IP-Enabled Services NPRM*, ¶ 41 (*citing, inter alia Louisiana Pub. Serv. Comm'n v. Commission*, 476 U.S. 355, 368-69 (1986)).

federal control over a particular service is unaffected by whether the Commission's regulatory power arises under Title II or is ancillary under Title I.[8]

The D.C Circuit has held that there is "no critical distinction between preemption by Title II regulation and preemption by the exercise of ancillary jurisdiction."[9] The Commission has similarly applied this principle in asserting exclusive federal jurisdiction regarding state regulation of BellSouth's voice mail service. In rejecting the arguments of state commissions that sought to regulate voice mail services, the Commission found "[w]hile BellSouth's voice mail service is an enhanced service, that fact does not limit our authority to preempt. The Court of Appeals for the District of Columbia Circuit has held specifically that there is 'no critical distinction between preemption by Title II regulation and preemption by the exercise of ancillary jurisdiction.'"[10]

Because there is no distinction between preemption using Title II and preemption using Title I ancillary jurisdiction, the Commission's preemption analysis regarding Vonage's service is not affected by the statutory classification issue. The Commission's preemption analysis will thus be the same regardless of the classification of the service, and thus precluding state regulation of Vonage's service does not depend on a determination that the service is an "information service" or a "telecommunications service." Therefore, the Commission can determine now that Vonage's service is interstate and subject to its exclusive jurisdiction and determine later, in the *IP Enabled Services Rulemaking*, whether to apply Title I or Title II regulation to Vonage's interstate service.

B. The Commission Should Declare That It Has Exclusive Jurisdiction Over Vonage's Interstate Service

Vonage's service is clearly interstate in nature. First, as the Petition explains, Vonage customers can only access the service over broadband Internet connections, such as that provided by DSL and cable modem service providers. Both Congress and the Commission have recognized that the Internet is inherently interstate and that applications, such as Vonage's DigitalVoice service, that use the Internet are interstate services as well. Indeed, the Act itself refers to the Internet as jurisdictionally interstate.[11]

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[8] *See California v. FCC*, 905 F.2d 1217, 1239-43 (9th Cir. 1990); *California v. FCC*, 39 F.3d 919, 939 (1994) (rejecting claims that Commission may only preclude state regulation when when it is acting under Title II).

[9] *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 217 (D.C. Cir. 1982, *cert. denied*, 461 U.S. 938 (1983).

[10] *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.*, Memorandum Opinion and Order, 7 F.C.C. Rcd 1619, 1622¶15, n. 44 (1992) *aff'd Georgia Public Servcie Commission v. FCC*, 5 F.3d 1499 *per curiam* (1993), *citing CCIA v. FCC*, 693 F.2d at 217.

[11] *See* 47 U.S.C. §230(f)(1) (defining the "Internet" as the "international computer network of both Federal and non-Federal interoperable packet switched data networks"); *see also*

Consistent with §230, the Commission has consistently found that applications provided over the Internet are interstate in nature. For example, the Commission has observed that IP Relay services are inherently interstate because the first leg of an IP Relay call comes over the Internet.[12] Accordingly, the Commission permitted the full recovery of IP Relay costs from interstate funds. Because DigitalVoice services are transmitted over the Internet there can be no question that they are jurisdictionally interstate.

Moreover, as the Petition explained, the nature of Vonage's service makes it impossible to divide the service into distinct intrastate and interstate components. As a result, any attempt to fetter Vonage's service in one state (such as Minnesota) would affect Vonage's service in other states. As the Petition explains, Vonage's service is inherently portable; customers can use the service anywhere they can attach their equipment to a broadband internet connection. Petition at 29 & n. 58. Further, Vonage cannot determine the actual physical location of its users.[13] Because Vonage customers can take their service anywhere in the United States — for that matter anywhere in the world —Vonage could never be sure of "the actual physical location" of customers using Vonage service. Petition at 28-29.[14]

Since Vonage cannot assure that its customers are not accessing the service in Minnesota, Vonage cannot assure compliance with the PUC's order. *See* Petition at 29. As the Petition explained, a customer in Minnesota may have Vonage service using a non-Minnesota telephone number. Conversely, subscribers in other states may use Minnesota numbers for their Vonage service. Further, any Vonage customer could, in theory travel to Minnesota at any time and connect their MTA computer to a broadband internet connection, without Vonage's knowledge. Because Vonage does not know where its customers are located when using DigitalVoice, and cannot prevent them from traveling to Minnesota and using Vonage service in that state, any effort to comply with Minnesota's regulatory system would be inexact and undoubtedly would require blocking some interstate traffic. The Commission should not permit such a result, regardless of whether Vonage is deemed to be providing information services or telecommunications services.

Because DigitalVoice service cannot be divided into distinct intrastate and interstate components, the Commission should assert exclusive federal control over Vonage services and

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Reno v. ACLU, 521 U.S. 844, 849-850 (describing the Internet as "an international network of interconnected computers").

[12] *Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 17 FCC Rcd 7779, ¶¶ 1, 15 (2002) ("*IP-Relay Order*").

[13] The Commission recognzies that with Internet based services there is "no automatic way to determine whether any call is intrastate or interstate. This is because Internet addresses do not have geographic correlates, and there is currently no Internet address identifier that can automatically give the location of the caller.)". *IP-Relay Order*, 17 FCC Rcd 7779, at ¶ 15.

[14] The Commission has previously recognized that the Internet allows users to "access information with no knowledge of the physical location of the server where that information resides." *Report to Congress* ¶ 64.

preclude state regulation that would require Vonage to block interstate transmissions. This assertion of exclusive jurisdiction is warranted "where it is not possible to separate the interstate and intrastate aspects of a particular matter."[15] The Commission recently applied this inseverability doctrine in its decision to preclude state regulation of pulver.com's Free World Dial Up service.[16] The Commission based its jurisdictional analysis in part on its finding that "it is impossible or impractical to attempt to separate FWD into interstate and intrastate components."[17] The Commission further found that such separation would be impossible because pulver.com's "technology does not enable Pulver to determine the actual physical location of an underlying IP address."[18] Thus, the Commission's jurisdictional analysis found pulver.com's offering similar "to those previously deemed exclusively interstate by the Commission where it has applied its "mixed use" rule."[19].

The Commission has historically used the mixed-use doctrine to bar state intrusions on its exclusive authority to regulate interstate communications. For example, the Commission found a California regulation that established a default line blocking policy to be unlawful because it precluded the transmission of Caller ID information on interstate calls, and the effect of that regulation was not severable so that it could only affect intrastate calls.[20] Further, the Commission asserted exclusive federal regulation of fixed wireless antennas because use of such antennas "in [interstate communications] is inseverable from their intrastate use, regulation of such antennas that is reasonably necessary to advance the purposes of the Act falls within the Commission's authority."[21] Similarly, when the Commission granted GTE's request to tariff the DSL Internet transport service sold to ISPs the Commission acknowledged that some of the transmissions passing over an Internet access line may be intrastate in nature, but that the interstate component was not *de minimis*. [22]

Similar considerations warrant an assertion of exclusive Commission jurisdiction in this case. Because Vonage can never know the physical location of its customers when they are using Vonage's service it is impossible for Vonage to determine whether a particular

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[15] *Texas Office of Pub. Util. Counsel v. Commission*, 183 F.3d 393, 422 (5th Cir. 1999) (citing *Pub. Serv. Comm'n of Maryland v. Commission*, 909 F.2d 1510, 1515 (D.C. Cir. 1990)).

[16] *FWD Order* at ¶ 22.

[17] *Id*.

[18] *Id*.

[19] *Id*

[20] *Rules and Policies Regarding Calling Number Identification Service -- Caller ID*, 10 Commission Rcd. 11700, ¶¶ 85-86 (1995).

[21] *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 Commission Rcd. 22983, ¶ 107 (2000).

[22] *See GTE Tel. Operating Cos. GTOC Transmittal No. 1148*, 13 Commission Rcd. 22466 ¶¶ 22, 25(1998) ("*GTE DSL Order*").

transmission is intrastate or interstate.[23] Without the ability to isolate Minnesota intrastate transmission from interstate transmissions the PUC cannot enforce its order with respect to Vonage's intrastate services without interfering with Vonage's ability to provide at least some jurisdictionally interstate services over interstate communications facilities. Such interference is unjustifiable under the Act's exclusive grant of authority to the Commission to regulate interstate communications services. Because the Commission's authority encompasses both interstate information services and interstate telecommunications services, an assertion of exclusive federal authority precluding Minnesota's impermissible regulation does not require the Commission to reach the classification issue.

C. Comments before the Commission and State Commissions Overwhelmingly Agree that VoIP Services Are Inherently Interstate

In addition to the multiple proceedings filed at the Commission, state commissions are also conducting proceedings to assess the regulatory treatment of VoIP services. In these proceedings the overwhelming sentiment of commenting parties is that Vonage's services are interstate. Attached to this document is an analysis of comments in several of these proceedings, particularly the Commission's own proceeding regarding the Vonage Petition, a Petition filed by Level 3 Communications,[24] and the proceeding open at the California PUC.[25] The opinion and analysis by the parties consistently supports Vonage's position here that its services are exclusively interstate. This analysis comes from a cross section of the communications industry and includes Regional Bell Companies, Interexchange carriers, equipment manufacturers, CLECs, and cable telephony providers.[26]

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[23] The Commission recently acknowledged that the interstate nature of the Internet called for a unifrom and consistent regulatory approach that would be unlikely if left to 50 separate state commissions. ("Uniformity and consistency are particularly important in the regulatory treatment of internet services because of the Internet's interstate (and international) architecture and the lack of any necessary correlation between service provider and physical locations." Brief of the United States and the Federal Communications Commission as *Amici Curiae*, *Vonage Holdings Corp. v. Minnesota PUC*, Appeal No. 04-1434 (U.S. Court of Appeals for the Eighth Circuit April 21, 2004) at 24.

[24] *Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(b)(1) and Rule 69.5(b),* WC Docket No. 03-266.

[25] *Order Instituting Investigation on the Commission's Own Motion to Determine the Extent to Which the Public Utility Telephone Service Known as Voice over Internet Protocol Should be Exempted from Regulatory Requirements*, Investigation No. 04-02-007 (CA PUC Feb. 11, 2004).

[26] See Exhibit A, attached to this presentation, for an analysis of the comments in the Vonage proceeding and the Level 3 proceeding currently pending before the Commission and the CPUC's Investigation regarding VoIP service.

III. THE IP-ENABLED SERVICES NPRM DOES NOT PRECLUDE THE COMMISSION FROM PROMPT ACTION ON THE LIMITED RELIEF THAT VONAGE REQUESTS IN ITS PETITION

Since Vonage filed its petition in September, 2003, the Commission has resolved two other petitions, one by pulver.com and one by AT&T, that raised issues related to the Commission's regulation of VoIP services. Although the Commission sought comment on the global issues raised by the rapid introduction of IP enabled services into the market, the Commission still resolved these two petitions that raised issues falling within the ambit of the NPRM. The Commission should do the same here.

In the *FWD Order*, the Commission found that the Free World Dialup service was an unregulated information service and that " state regulations that seek to … subject [the service] to public-utility type regulation would almost certainly pose a conflict with [the Commission's] policy of nonregulation" of information services.[27] The order further clarified, however, that the Commission's findings had no bearing on the outcome of similar issues raised in the NPRM and "was confined to the FWD service as described in th[e] Order."[28]

In *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, the Commission determined that AT&T's routing of phone-to-phone traffic over AT&T's Internet backbone network meant that the specific AT&T service at issue was classified as a telecommunications service and accordingly AT&T was obligated to pay interstate access charges for termination of such traffic.[29] As it did in the *FWD Order*, the Commission stated that its resolution of AT&T's petition was based on its narrow application of the law to the unique service AT&T provides. *Id*.

As it did in the *AT&T Order* and in the *FWD Order*, the Commission should decide Vonage's petition based on the unique interstate nature of Vonage's DigitalVoice service. Such a ruling could be narrowly tailored to assert exclusive federal jurisdiction over the regulation of Vonage's DigitalVoice service which is clearly distinct both from the services that pulver.com and AT&T provide.

Further, making such a ruling now is in the public interest, as the Commission's assertion of exclusive federal authority over regulation of Vonage's service would best serve the public. While the Commission examines the "jurisdictional questions more broadly in our IP-Enabled Services Notice of Proposed Rulemaking, [the Commission] best serve[s] the public by being clear as to the nature of [the Commission's] authority over the specific service at issue in this petition."[30]

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[27] *FWD Order* ¶ 15.

[28] *Id* at n. 55.

[29] WC Docket 02-361, Order, FCC 04-97 ¶ 1 (rel. April 21, 2004).

[30] *FWD Order* ¶ 15; *See also AT&T Order* at ¶ 2.

IV. CONCLUSION

The Commission should immediately declare that it has exclusive jurisdiction over Vonage's interstate services, and that the Minnesota PUC's regulation of Vonage's DigitalVoice service is an intrusion on that authority because it is inherently impossible to separate any service offered over the public Internet (regardless of its regulatory classification) into distinct interstate and intrastate components. The pending NPRM and the Commission's action in the *FWD Order* and the *AT&T Order* specifically contemplate that the Commission should make this determination regarding Vonage's narrow, service specific petition without regard to the timing of action on the pending NPRM.